IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1664

JOHN LAWRENCE DUFAULT
and
DENNIS ARNOLD TRONCATTY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL KENNEDY
2424 Pine Street
San Francisco, CA 94115
Attorney for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

JOHN LAWRENCE DUFAULT
and
DENNIS ARNOLD TRONCATTY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 19, 1976, petition for rehearing denied on April 19, 1976.

OPINIONS BELOW

The unreported per curiam opinion of the Court of Appeals is attached in the Appendix hereto and labeled "A". This opinion affirms a judgment of conviction of petitioners on four counts of mailing obscene materials in violation of 18 U.S.C. § 1461. The unreported per curiam order of the Court of Appeals denying petitioners' petition for rehearing is attached hereto in the Appendix and labeled "B". Petitioners were tried in the United States District Court for the Northern District of Texas, Fort Worth Division, by a jury and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 19, 1976, petition for rehearing denied on April 19, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the government's arbitrary selection of a forum and manufacture of the jurisdictional and venue prerequisites deprive petitioners of due process under the Fifth Amendment and exceed the permissible scope of jurisdiction and venue under 18 USC § 1461 and 18 USC § 3237?

2. Were petitioners deprived of due process of law by the Trial Court's instruction to the jury that the jury may disregard entirely the testimony of expert witness and/or that expert testimony is not necessary to judge the obscenity of material designed for a particular deviant group?

3. Did the trial court err in improperly instructing the jury that it could determine the issue of potential prurient appeal of the materials based upon the appeal to *either* the average person *or* the average member of a deviant group? Similarly, did the trial court err in failing to instruct the jury that the standards of acceptable limits of candor (or patent offensiveness) of the community and/or the issue of redeeming social value or importance must be construed in terms of the specific deviant group for which the materials were intended?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Fifth Amendment:

> "No person shall . . . be deprived of life, liberity, or property, without due process of law . . ."

STATUTES INVOLVED

United States Code

18 U.S.C. § 1461

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;
>
> * * * * * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be non-mailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than

$5,000.00 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both for each such offense thereafter."

* * * * * * * * *

18 U.S.C. § 3237

* * * * * * * * *

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

* * * * * * * * *

STATEMENT OF THE CASE

In April of 1972 Petitioners, both of whom were and are adult homosexuals, commenced a mail order business in San Francisco, California. They operated under the name of Dimension. They specialized in mailing sexually explicit homosexual brochures and films to individual adult males who requested these homosexual materials.

United States Postal Inspector Dennis Alex, stationed in San Francisco, using the false name and address of Ernest Shultz, LaFollette, Tennessee, and posing as a homosexual, ordered a brochure from petitioners to be mailed to Shultz in LaFollette, Tennessee. By prior design the Postmaster in LaFollette, Tennessee, forwarded this brochure to Alex in San Francisco. Being apparently dissatisfied with Tennessee and with his false name of Shultz, Alex, in San Francisco, removed the "Shultz" name and substituted another false name "Charles Shuler of Box 664, Azle,

Texas". Alex then ordered from Dimension two films which are the subject matter of Count 2 of the indictment herein.

These films were mailed by Dimension from San Francisco to Azle, Texas, and then forwarded, *unopened,* by the Post-Mistress of Azle, Texas, to Alex in San Francisco. The films were first viewed by Alex in San Francisco.

Homosexual brochures involved in Counts 3 and 4 were also mailed by Dimension to "Shuler" in Azle, Texas, and forwarded *unopened* to Alex in San Francisco. None of the materials in Counts 2, 3 and 4 was ever even seen by anyone in Texas.

Count 1 involved a homosexual brochure sent by Dimension to a Mr. E. K. Brink, as a result of Brink having ordered sexually oriented materials to study them. Brink decided that he did not want any more sexually oriented materials, so he filed a prohibitory with the Postal Service. Thereafter, he received no more materials from Dimension.

Alex deliberately and arbitrarily chose not to charge petitioners in LaFollette, Tennessee, or even in San Francisco, although he had brought charges in San Francisco in the past. Instead, petitioners were indicted December 13, 1973, on four counts of mailing obscene materials in the Northern District of Texas. Jurisdiction was founded on the alleged violation of a federal statute.

All three of the brochures (Counts 1, 3 and 4) and both films, (Count 2) involve materials designed and intended for homosexuals.

The trial judge instructed the jury that expert testimony was not necessary to determine obscenity in

this case and that they could determine the question of obscenity without regard to expert testimony offered. The trial judge instructed the jury that the prurient appeal of the materials could be based upon *either* appeal to the average heterosexual *or* the average homosexual. The judge did not instruct the jury regarding the specific group by whom to measure the limits of candor and social inmportance.

On April 18, 1975, both petitioners were found guilty on each of the four counts. Petitioners were sentenced on June 5, 1975 to imprisonment for a period of three years on each of the four counts, said sentences to run concurrently.

Petitioner appealed his case to the United States Court of Appeals for the Fifth Circuit, which affirmed in a per curian opinion on March 19, 1976, petition for rehearing denied April 19, 1976.

REASONS FOR GRANTING THE WRIT

I. The Government's Arbitrary Selection of a Forum and Manufacture of the Jurisdictional and Venue Prerequisites of 18 USC §§ 1461 and 3237 Deprived Petitioners of Due Process and Exceeded the Permissible Scope of Jurisdiction and Venue Provided by Congress

The instant prosecution was initiated by a postal inspector whose office was in San Francisco, California. His investigation determined that appellants, and their company Dimension, were also located in San Francisco and that the mailings under investigation were made in San Francisco. The mailing which brought Dimension to the inspector's attention was delivered to a Post Office Box in LaFollette, Tennessee. Despite these facts, the same postal inspector then created a fictitious character with a Post Office Box in Azle, Texas, and requested that Dimension of San Francisco send the same

type of materials to the Northern District of Texas. Finally, after setting up the fictitious recipient in Texas and inducing appellants to enter into a mailing to Texas, the postal inspector, through the United States Attorney, sought and obtained an indictment in the Northern District of Texas.

Petitioners do not contend that 18 U.S.C. §§ 1461 and 3237 are unconstitutional on their face. Petitioners accept the regulation of commerce in obscenity by Congress and the location of trial in the community receiving the materials. Petitioners do contend that where the use of the mails is manufactured by the government in order to create a national problem subject to Congressional regulation and to locate trial in a forum favorable to the prosecution, neither venue nor jurisdiction can be said to exist and an egregious violation of due process has been attempted.

18 U.S.C. § 1461 provides that "whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable . . ." shall suffer the punishment specified in the statute. The use of the mails makes the problem of obscenity a matter of national concern, as opposed to a matter appropriate only for state sanctions. Dissemination of obscenity through the channels of commerce has long been considered a problem appropriate for federal legislation and federal judicial attention. *Ex parte Jackson,* 96 U.S. 727 (1877). As stated by the Commission on Obscenity and Pornography, in its Finding of Fact and Declaration of Policy, "The Congress finds that the *traffic* in obscenity and pornography is a matter of national concern." Public law 90-100, Oct. 3, 1967, 81 Stat. 253 (emphasis added). The federal statutory scheme regulating obscenity, 18 U.S.C. §§ 1461-65, evi-

dences a clear legislative intent to deal only with *traffic* in obscenity, i.e., interstate transportation for sale or distribution or by common carrier, and use of the mails. Conspicuously absent from this regulatory scheme are matters which are local in character, e.g., pornographic movie theatres and book stores.

In the case at bar, as to Counts 2, 3 and 4, the use of the mails was in fact manufactured by the government in order to transform a local "problem" into a matter of national concern, invoking the jurisdiction of federal law and federal courts. Petitioners contend that the manufacture of federal jurisdiction by federal officials supplying the jurisdictional elements and acting to ensure their presence, does not in fact meet the jurisdictional prerequisites of 18 U.S.C. § 1461. Such artifices should be disregarded by the court because they contravene the clear legislative intent to regulate obscenity only when it actually becomes a matter of national concern in a genuine sense and not due to the manufacture of jurisdictional prerequisites by federal officials. Moreover, manufactured jurisdiction poses grave dangers to the fair and efficient operation of the federal criminal justice system.

Manufactured jurisdiction in the context of diversity of citizenship cases has long been considered an abuse of jurisdictional provisions and has been rejected by courts and Congress. 28 U.S.C. § 1359, *Morris* v. *Gilmer,* 129 U.S. 315 (1889), (plaintiff moved temporarily to another state to create diversity), *Southern Realty and Investment Co.* v. *Walker,* 211 U.S. 602 (1909), (plaintiff corporation set up solely to create diversity when it received assigned claims). Sham transactions used solely to create jurisdiction are considered a fraud on the court. *Morris* v. *Gelmer, supra, Lehigh Mining*

and Manufacturing Co. v. *Kelly,* 160 U.S. 327 (1895). Moreover, as the Court stated in *McSparran* v. *Weist,* 402 F.2d 867, 873 (3d Cir. 1968), "The multiplication of 'manufactured' diversity cases is a reflection on the federal judicial system and brings it into disrepute."

The manufacture of jurisdictional prerequisites is not only inherently disreputable, but also tends to clog federal court dockets with problems of an essentially local nature, to overextend limited federal police resources, and to alter the sensitive relation between federal and state criminal jurisdiction. *United States* v. *Bass,* 404 U.S. 336, 349-50 (1972), *Rewis* v. *United States,* 401 U.S. 808, 811-12 (1971). In the context of obscenity prosecutions, manufactured jurisdiction has given rise to all of the above evils. As argued above, the problem of obscenity is essentially a local one. Local law enforcement is aided by the federal government only when the problem involves the use of certain channels of commerce so that it becomes a problem of national concern. To allow federal officials to manufacture the elements of federal jurisdiction is to effectively circumvent this delicate federal-state balance. Government agents carefully select the forum they feel is more favorable to the prosecution and then supply all the elements necessary for trial in the forum. This has resulted in federal courts in general hearing a vast number of obscenity cases which could, and indeed should, be tried by state courts. Moreover, federal courts in certain areas, considered especially favorable to the prosecution, are forced to hear an enormously disproportionate number of obscenity cases, thereby seriously clogging court dockets.

In *United States* v. *Archer,* 486 F.2d 670 (2nd Cir. 1973), attempts by federal narcotics agents to manu-

facture jurisdiction under 18 U.S.C. § 1952, the Travel Act, were rejected in circumstances very analogous to the case at bar. In *Archer*, federal narcotics agents investigating corruption in the New York criminal justice system arranged for the arrest of a narcotics agent. The agent then solicited an attorney to bribe the District Attorney in order to avoid indictment. The agent went from New York to New Jersey so that two phone calls from defendants would be interstate and thus in violation of the Travel Act. The agent was later sent to Paris on a legitimate assignment and received a third phone call there.

The Government asserted that the interstate and international phone calls met the jurisdictional requirements of the Act, which provide that "Whoever . . . uses any facility in interstate or foreign commerce, including the mail . . ." to accomplish unlawful activities related to racketeering shall be subject to the punishment specified. 18 U.S.C. § 1952(a). Judge Friendly, writing for the Court, stated with respect to the New Jersey calls that:

> Whatever Congress may have meant by § 1952(a)(3), it certainly did not intend to include a telephone call manufactured by the government for the precise purpose of transforming a local bribery offense into a federal crime *Id.* at 681

The Court went on to hold that the jurisdictional provisions of the Travel Act were not intended to include cases where

> federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. *Id.* at 682.

The Court thus refused to recognize the telephone calls to New Jersey as bringing the case within the jurisdictional requirements of § 1952. After disregarding these calls, the Court turned to the third call, to Paris.

> We are thus left only with Barrio's call from Paris on April 25. That call was not planted in the sense that the Newark call was; the Government did not send Barrio abroad for the sole purpose of making a foreign call. But, apart from the question, which we leave unresolved, whether a communication with an agent can ever meet the requirement of § 1952(a), the Paris call rather precisely fits Judge Medina's characterization in *United States* v. *Corallo, supra,* 413 F.2d at 1325 of 'a causal and incidental occurrence' and Mr. Justice Marshall's reference in *Rewis, supra,* 401 U.S. at 812 . . . to 'a matter of happenstance' . . . we hold that the Paris call was insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States *Id.* at 682-83.

The Court thus reversed the convictions and dismissed the Indictment.

Insofar as it relates to the rejection of manufactured jurisdiction, 18 U.S.C. § 1952 and § 1461 are indistinguishable. The pertinent language of 18 U.S.C. §§ 1461 and 1952 is virtually identical. § 1461 provides:

> *Whoever* knowingly *uses* the *mails.*

§ 1952(a) provides:

> *Whoever* . . . *uses* any facility in interstate or foreign commerce, including the *mail* (emphasis added to both sections).

Both statutes are deemed "continuing offenses" and thus are subject to the venue provisions of 18 U.S.C. § 3237. *United States* v. *Luros,* 243 F. Supp. 160 (D.C.

Iowa 1965) (§ 1461), *United States* v. *Winston,* 267 F. Supp. 555 (D.C.N.Y. 1967) (§ 1952). Both statutes are directed at criminal activities which become matters of national concern due to the use of the channels of commerce. *Erlenbough* v. *United States,* 409 U.S. 239, 245 ns. 14, 15, 246 (1972), *Rewis* v. *United States, supra.* Commission on Obscenity and Pornography, and discussion *supra.* Moreover, the dangers attendant upon manufactured jurisdiction are the same under both statutes. The overextension of federal police resources, the clogging of federal court dockets, the alteration of sensitive federal-state balances in the area of criminal jurisdiction and the disrepute which manufactured jurisdiction brings on the federal judiciary are all present under § 1461 and are perhaps even more potent than under § 1952.

Similarly, the fact situation in the case at bar is indistinguishable from that in *Archer,* if not even more persuasive. In *Archer* federal agents set up phone calls. In Petitioners' case, federal agents set up mailings. In Petitioners' case the postal inspector operated out of San Francisco and the materials were sent unopened to him from Texas. Jurisdiction is thus "manufactured" in this case just as it was in *Archer,* where the narcotics agent left New York to receive phone calls in New Jersey. In both cases the government manufactures events in order to transform what would otherwise be entirely a local issue into a matter of national concern.

Just as § 1461 was not intended to apply to situations in which the use of the mails was manufactured by federal agents, neither was § 3237 intended to allow the location of trial in the place of receipt of the mailed material when federal agents insure the location of

trial in a favorable forum by selecting a place of delivery and creating a recipient in that place.

In *Reed Enterprises* v. *Clark,* 278 F. Supp. 372 (DCDC 1967), a three-judge panel closely examined the venue provisions applicable to 18 U.S.C. 1461. The Court in *Reed Enterprises* noted that the 1958 amendment to Section 1461 was in specific response to a ruling of the Tenth Circuit Court of Appeal in 1953 (*United States* v. *Ross,* 205 F.2d 619) that prosecutions for the mailing of obscene materials may be had only in the district wherein such materials were deposited in the mails. (278 F. Supp. 378) Congress felt that distributors would be able to select a "liberal" venue from which to distribute their materials, thus lessening the chance that they would be convicted of any "obscenity" offense. But the Court in *Reed Enterprises* also points out that Congress was not so much convinced of the accuracy of this "liberal" forum-shopping as it was upset that the community which was *directly affected* by the materials, the community into which the materials were delivered, was unable to take action to "protect itself" i.e. vindicate its own "community standards". The Congressional debate focused on this point:

> The interpretation given by the Courts has, to all intents and purposes, nullified previous congressional action. They have said a promoter can be prosecuted only where he puts materials into the mail. As a result the community most affected by the crime, that is, the one where the stuff is circulated, has no opportunity whatsoever to protect itself.
>
> Congressional Record, Vol. 104, No. 78, pp. 8043-8046, May 19, 1956 cited in *Reed Enterprises* v. *Clark, supra,* 278 F. Supp. at 379.

Here the materials were never even viewed in Texas, let alone circulated. While the courts have been careful not to broadly construe venue provisions, the Congress has specifically acted to allow local communities to "protect themselves" from obscene materials which may enter their community. But Congressional permission to protect one's community is not tantamount to permission for the government to solicit materials into a community for the purpose of prosecuting there. Such solicitation bears no relation to the protection of the community. In this case the local community needs protection from the postal inspector who was the sole cause of the mailing. This practice is the reverse, and worse, of the forum-shopping on the part of distributers because it actually creates a community "problem" where no problem existed.

Such abuses of the venue provisions of 18 U.S.C. 3237 may not be tolerated. The Supreme Court has pointed out that permitting such arbitrariness in the selection of venues

> not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.
>
> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. *United States* v. *Johnson*, 323 US 273, 275-276 (1944)

When the provisions of 18 U.S.C. 3237 are construed in the light of the stated policy of allowing local communities to protect themselves, it becomes manifest that the creation of a "community" problem in order to select a venue for the prosecution of an offense which is particularly sensitive to the vagaries of community sentiment is a crass abuse. Moreover, it is petitioners' experience and the experience of counsel that this abuse is increasing in frequency and magnitude. *C.f. United States* v. *Friedman,* 488 F.2d 1141, 1142 (10th Cir. 1974). In order to remedy this abuse, this Court should grant a writ of certiorari in this case.

II. The Trial Court Instructed the Jury that Expert Testimony Is Not Necessary in a Case Where Materials Were Intended for and Disseminated to Members of a Deviant Group.

Petitioners do not argue that controlling precedents require expert testimony in every obscenity case, nor that every time materials touch on deviant behavior expert testimony is required. Petitioners do argue that prior decisions of this Court uphold the need for expert testimony when materials are designed for and disseminated to members of a socially and politically well-defined deviant group.

The materials distributed in the instant case were without exception designed and intended for, and disseminated to, a clearly defined "deviant" sexual group to wit, male homosexuals. Since *Mishkin* v. *New York,* 383 U.S. 502, 508, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966),

this Court has recognized that the standards to be applied to materials specifically intended for and disseminated to a specific "deviant" sexual group must relate directly to that group, and not to the general public or "average person". And while the necessity for expert testimony on the issues of "straight" obscenity has been dispensed with, the necessity for expert testimony as to the issues relating to the materials intended for "deviant" groups has been just as clearly preserved.

In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), the Court rejected the contention that expert testimony must be presented on issues of obscenity, but at the same time specifically noted that a significantly different situation is presented when the materials in question are directed to a "deviant" sexual group whose preferences are such that "the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest". 413 U.S. 49, 56 n.6. The Court cited with approval on this point the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Klaw*, 350 F.2d 155 (1965).

The defendants in the *Klaw* case had been convicted of conspiracy to violate 18 U.S.C. 1461 upon evidence consisting largely of the materials themselves. Said materials were exclusively devoted to the clearly defined sexual "deviance" of sado-masochism or "bondage". In considering the lack of evidence in the prosecution's case concerning proof of what stimulates the "prurient interest" of the average members of a "deviant" group, the Court of Appeals for the Second Circuit declared that

> some proof should be offered to demonstrate such appeal, thereby supplying the factfinders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in Klaw's troubles with the postal censors, "obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence."
>
> *Klaw* v. *Schaffer, supra*, 151 F. Supp. at 539 n.6, *United States* v. *Klaw*, 350 F.2d 155, 166.

The Court of Appeal went on to describe the process by which a jury, given no guidance as to what does and does not appeal to the prurient interest of a "deviant" group, might arrive at a conclusion as to the issue of the obscenity regarding particular materials:

> They (the jurors) were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is "prurient appeal". Because the jury was given no basis for understanding exactly how and why the material appeals to its audience, whether deviate or average person, it may too readily supply an explanation—"prurient appeal".

It has long been recognized that the minority in society needs special protection. *United States* v. *Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938). The whims, fears and prejudices of the majority toward the "undefined person, whose psyche is not known", pose threats to the important first amendment interests of the minority. This threat, that the "censor's stamp" will be affixed by members of the uniformed majority on the basis of misconceptions concerning the minority, is the heart of the requirement

that expert testimony be presented in such cases. *United States* v. *Klaw, supra,* at 167. The "inadequacy" adverted to in *Paris Adult Theatre* and the "social realities" which the Court took cognizance of in *Mishkin* v. *New York,* 383 U.S. 502, 509 (1966), coalesce to require expert testimony to protect the sexual minority in society. In order to adequately protect the First Amendment rights of homosexuals, as well as to conform the Fifth Circuit decision to prior decision of this Court, this petition for writ of certiorari should be granted.

III. When Materials Are Designed and Intended for and Disseminated to a Specifically Defined Deviant Group, the Issues of Prurient Appeal, the Limits of Candor and Redeeming Social Value Must Be Measured by the Average Member of that Group.

Mishkin v. *New York*, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966), firmly established the proposition that a determination of the existence of prurient appeal in materials intended for and disseminated to "deviant" sexual groups must be made in reference to the response *of that group.* When all the materials in a given case relate to a deviant group, with no materials directed at or disseminated to the "average person" in the community at large, the issue of the prurient appeal of the materials must be determined exclusively in relation to the deviant group.

If the jury in a case involving materials intended exclusively for a deviant group is instructed on the prurient appeal to an "average person", that jury will be free to judge the material not on the basis of the reactions of the probable and intended recipients of the film, but rather on the basis of the reaction of the "average person" who would never see the film. When it is recalled that the definition of "prurient"

recalls the notions of "shame", "unhealthiness" and "unwholesomeness" it becomes apparent that a jury might justifiably attach such reactions to an "average person" viewing "deviant" materials when the intended recipients would have no such reaction.

The instructions in the instant case not only mingled the notions of the "average person" and the "average member of the deviant group", but did so without clarifying under what circumstances the jury was to apply one or the other model. First, the instructions posed the two paradigms in the alternative, without any explanation of when one or the other should apply, allowing the jury to apply either one:

> The first test to be applied in determining whether the material charged herein is obscene is whether, applying contemporary community standards as of the time of the particular mailing, the material, taken as a whole, appeals to the prurient interest of the average person of the community as a whole *or* of the average member of the homosexual group to which the appeal was made. (emphasis added)

But this first exposition is followed shortly by an explanation that prurient interest must be determined "in light of contemporary community standards as of the time of the particular mailing as applied by the average person with an average and normal attitude toward, and interest in, sex." The instructions then again pose the prurient appeal test regarding the "average person" and the "average member" in the alternative, without any suggestion that the two standards may not be applied simultaneously, or in some haphazard combination.

Petitioners do not suggest that the individual portions of the instructions are determinative of the pro-

priety of the charge to the jury as a whole, but rather that the combination of standards and models without sufficient explanation convoluted the instructions as a whole to the extent that appellants were deprived of their right to a proper application of the law by the jury. Particularly because the instructions erroneously allowed the jurors to apply the "average person" standard, when they should have been charged to apply the standard of the average homosexual.

No evidence was produced by the government in this case indicating what were the acceptable limits of candor in the community of persons consisting of male homosexuals, the group for which the materials were exclusively intended. Likewise, no evidence was produced indicating what does, and does not, have redeeming social value or importance for this group. Further, the instructions in the case failed to direct the standards related to limits of candor and social importance to the specific group for which the materials were exclusively intended. Petitioners contend that the arguments of *United States* v. *Klaw*, 350 F.2d 155 (CA 2d, 1965), cited with approval in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), that the issue of prurient appeal must be measured in terms of the specific deviant group for which the material is intended, apply equally to the other criteria by which allegedly obscene material is judged.

If the material in question is intended exclusively for, and disseminated exclusively to, a specific deviant group, and indeed only those members of such group as specifically request the material, the issues of the permissible limits of candor and the existence of social importance must be gauged with regard to that specific

group. It is not sufficient to allow the materials to speak for themselves, and allow the jurors to rely upon nothing more than their personal experience, when their experience may not have included any familiarity whatsoever with the limits of candor extant in the homosexual community, nor the factors which provide redeeming social value for that group.

If, because of the jury's lack of experience with such a group, it is necessary to present expert testimony in order to explain to a lay jury what prurient interest might exist for a deviant group, expert testimony should likewise be required to prove the issue of the limits of candor within the group and the question of social importance for that group. Since it is incumbent upon the government to prove that the materials in question exceed the limits of candor and are without redeeming social importance, the government must produce expert testimony on those issues regarding deviant groups or fail in its proof.

In its per curiam decision, the Fifth Circuit in this case cited *Hamling* v. *United States,* 418 U.S. 87 (1974). In that case this Court upheld an instruction which allowed the jury to measure prurient appeal by either the average person or the average member of a deviant group. However, the Court did not purport to overrule prior decisions and therefore the apparent conclusion is that this holding was due to the unique nature of the materials in that case. The materials were not, as in the instant case, designed for a specifically defined social and political group. *Id.* at 92-93. Given these facts, it is natural that the Court allowed the jury to measure obscenity by the standards of the various recipients. *Hamling* does not cover the case at bar and was improperly relied upon in sustaining the District Court's instruction.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MICHAEL KENNEDY
2424 Pine Street
San Francisco, CA 94115
Attorney for Petitioners

Dated: May 7, 1976

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2612

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

JOHN LAWRENCE DUFAULT and DENNIS ARNOLD TRONCATTY,
d/b/a Dimension, *Defendants-Appellants*.

(Received March 22, 1976)

Appeal from the United States District Court for the
Northern District of Texas

(March 19, 1976)

BEFORE: TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

PER CURIAM: AFFIRMED. *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *Slepicoff*, 524 F.2d 1244 (5th Circuit. 1975); *United States* v. *Hill*, 500 F.2d 733 (5th Cir. 1970). See Local Rule 21.[1]

---

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2612

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN LAWRENCE DUFAULT and DENNIS ARNOLD TRONCATTY, d/b/a Dimension, *Defendants-Appellants.*

(Filed April 19, 1976)

Appeal from the United States District Court for the Northern District of Texas

On Petition for Rehearing

(April 19, 1976)

BEFORE: TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.